

UNITED STATES COURT OF APPEALS July 23, 2009

FOR THE TENTH CIRCUIT Elisabeth A. Shumaker
Clerk of Court

In re:

FELDON J. JACKSON, JR.,

No. 09-2168

Movant.

ORDER

Before **TACHA, HARTZ, and TYMKOVICH**, Circuit Judges.

Feldon J. Jackson, Jr., a New Mexico state prisoner proceeding pro se, moves for authorization to file a second or successive petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. We deny authorization.

In 1982, Mr. Jackson was convicted of first degree felony murder, attempted first degree felony murder, and armed robbery and sentenced to life imprisonment plus twenty-six years. The New Mexico Supreme Court affirmed his convictions. His attempts to receive state post-conviction relief met with no success.

In his first petition for a writ of habeas corpus, filed in 1992, Mr. Jackson asserted nine claims: (1) he was denied due process when the death qualification of the jury pool occurred prior to the selection of the panel for the guilt determination; (2) he was denied a fair trial when the jury was impermissibly

prejudiced against him by conduct of the prosecutor and by the trial court's admission of evidence; (3) the trial court should have declared a mistrial after the jury considered material not admitted into evidence; (4) his trial and appellate counsel were ineffective; (5) the prosecutor's misconduct deprived him of a fair trial; (6) the trial court denied him due process by failing to make certain rulings; (7) the trial court should have instructed the jury on diminished capacity; (8) the trial court erred in denying his two post-conviction motions without granting him an evidentiary hearing; and (9) the trial court lacked jurisdiction because the foreman of the grand jury did not endorse the indictment. Mr. Jackson consented to dismissal of claim (8), and the federal district court dismissed claims (4), (5), (6), and (7) as procedurally barred. In a subsequent order, that court dismissed the remaining claims on their merits. We affirmed the dismissal. *Jackson v. Shanks*, 143 F.3d 1313 (10th Cir.), *cert. denied*, 525 U.S. 950 (1998).

Mr. Jackson now seeks authorization to raise one claim in a second or successive habeas petition: he was denied his right to due process when his trial court record was destroyed, and he is unable to obtain a hearing on this matter in state court. He asserts that this claim is based on newly discovered evidence consisting of an anonymous letter he received in August 2005, which contained an affidavit filed by the state clerk of court on August 27, 1989, stating that his trial record was being destroyed by erasing the tapes and shredding the logs.

To obtain authorization to file a second or successive habeas petition based on newly-discovered evidence, Mr. Jackson must make a prima facie showing that his new evidence “would be sufficient to establish by clear and convincing evidence that . . . no reasonable factfinder would have found [him] guilty of the underlying offense.” 28 U.S.C. § 2244(b)(2)(B)(ii). Mr. Jackson fails to make this showing. Indeed, he does not even assert that there is a high probability that he is actually innocent of the offenses for which he was convicted. *See Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005).

Accordingly, we DENY authorization to file a second or successive habeas petition. Our denial is not appealable and “shall not be the subject of a petition for rehearing or for a writ of certiorari.” 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", followed by a horizontal flourish.

ELISABETH A. SHUMAKER, Clerk